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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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12 RAYMOND L. LAWSON,)
13 Petitioner,) No. C 06-2821 CRB (PR)
14 vs.)
15 A. P. KANE, Warden,) ORDER DENYING
16 Respondent.) PETITION FOR A WRIT OF
) HABEAS CORPUS
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19 Petitioner, a state prisoner incarcerated at the Correctional Training
20 Facility in Soledad, California, seeks a writ of habeas corpus under 28 U.S.C. §
21 2254 challenging the California Board of Prison Terms' ("BPT") February 5,
22 2005 decision to deny him parole.

23 Per order filed on September 6, 2006, the court found that petitioner's
24 claim that the BPT's decision finding him not suitable for parole does not
25 comport with due process appears colorable under § 2254, when liberally
26 construed, and ordered respondent to show cause why a writ of habeas corpus
27 should not be granted. Respondent has filed an answer to the order to show cause
28 and petitioner has filed a traverse.

1 **BACKGROUND**

2 On November 17, 1981, petitioner pled guilty to second degree murder in
3 Los Angeles County superior court and was sentenced to an indeterminate term
4 of 15 years to life in state prison.

5 Petitioner has been found not suitable for parole each time he has appeared
6 before the BPT. On February 5, 2005, petitioner appeared before the BPT for a
7 subsequent parole consideration hearing. The BPT again found him not suitable
8 for parole and denied him a subsequent hearing for three years.

9 Petitioner challenged the BPT's February 5, 2005 decision in the state
10 superior, appellate and supreme courts. After the Supreme Court of California
11 denied his petition for review on February 22, 2006, the instant federal petition
12 for a writ of habeas corpus followed.

13 **DISCUSSION**

14 A. Standard of Review

15 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),
16 codified under 28 U.S.C. § 2254, provides "the exclusive vehicle for a habeas
17 petition by a state prisoner in custody pursuant to a state court judgment, even
18 when the petitioner is not challenging his underlying state court conviction."

19 *White v. Lambert*, 370 F.3d 1002, 1009-10 (9th Cir. 2004). Under AEDPA, this
20 court may entertain a petition for habeas relief on behalf of a California state
21 inmate "only on the ground that he is in custody in violation of the Constitution
22 or laws or treaties of the United States." 28 U.S.C. § 2254(a).

23 The writ may not be granted unless the state court's adjudication of any
24 claim on the merits: "(1) resulted in a decision that was contrary to, or involved
25 an unreasonable application of, clearly established Federal law, as determined by
26 the Supreme Court of the United States; or (2) resulted in a decision that was

1 based on an unreasonable determination of the facts in light of the evidence
2 presented in the State court proceeding." Id. at § 2254(d). Under this deferential
3 standard, federal habeas relief will not be granted "simply because [this] court
4 concludes in its independent judgment that the relevant state-court decision
5 applied clearly established federal law erroneously or incorrectly. Rather, that
6 application must also be unreasonable." Williams v. Taylor, 529 U.S. 362, 411
7 (2000).

8 While circuit law may provide persuasive authority in determining
9 whether the state court made an unreasonable application of Supreme Court
10 precedent, the only definitive source of clearly established federal law under 28
11 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the Supreme
12 Court as of the time of the state court decision. Id. at 412; Clark v. Murphy, 331
13 F.3d 1062, 1069 (9th Cir. 2003).

14 B. Legal Claims and Analysis

15 Petitioner seeks federal habeas corpus relief from the BPT's February 5,
16 2005 decision finding him not suitable for parole, and denying him a subsequent
17 hearing for three years, on the ground that the decision does not comport with
18 due process. Petitioner claims that the BPT's decision is not supported by some
19 evidence in the record and is improperly based on the unchanging facts of his
20 commitment offense and pre-commitment conduct. Petitioner also claims that
21 the BPT violated the terms of his plea agreement by considering the commitment
22 offense to be a basis for parole denial.

23 California's parole scheme provides that the board "shall set a release date
24 unless it determines that the gravity of the current convicted offense or offenses,
25 or the timing and gravity of current or past convicted offense or offenses, is such
26 that consideration of the public safety requires a more lengthy period of
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1 incarceration for this individual, and that a parole date, therefore, cannot be fixed
 2 at this meeting.” Cal. Penal Code § 3041(b). In making this determination, the
 3 board must consider various factors, including the prisoner’s social history, past
 4 criminal history, and base and other commitment offenses, including behavior
 5 before, during and after the crime. See Cal. Code Regs. tit. 15, § 2402(b) – (d).

6 California’s parole scheme “gives rise to a cognizable liberty interest in
 7 release on parole” which cannot be denied without adequate procedural due
 8 process protections. Sass v. California Bd. of Prison Terms, 461 F.3d 1123, 1128
 9 (9th Cir. 2006); McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002). It
 10 matters not that, as is the case here, a parole release date has never been set for
 11 the inmate because “[t]he liberty interest is created, not upon the grant of a parole
 12 date, but upon the incarceration of the inmate.” Biggs v. Terhune, 334 F.3d 910,
 13 914-15 (9th Cir. 2003).

14 Petitioner’s due process rights require that "some evidence" support the
 15 parole board's decision finding him unsuitable for parole. Sass, 461 F.3d at 1125
 16 (holding that the “some evidence” standard for disciplinary hearings outlined in
 17 Superintendent v. Hill, 472 U.S. 445, 454-55 (1985), applies to parole decisions
 18 in § 2254 habeas petition); Biggs, 334 F.3d at 915 (same); McQuillion, 306 F.2d
 19 at 904 (same). This "some evidence" standard is minimally stringent and ensures
 20 that “the record is not so devoid of evidence that the findings of [the BPT] were
 21 without support or otherwise arbitrary.” Hill, 472 U.S. at 457. Determining
 22 whether this requirement is satisfied “does not require examination of the entire
 23 record, independent assessment of the credibility of witnesses, or weighing of the
 24 evidence.” Id. at 455-56 (quoted in Sass, 461 F.3d at 1128).

25 Due process also requires that the evidence underlying the parole board's
 26 decision have some indicia of reliability. Biggs, 334 F.3d at 915; McQuillion,

1 306 F.3d at 904. Relevant in this inquiry "is whether the prisoner was afforded
 2 an opportunity to appear before, and present evidence to, the board." Morales v.
 3 California Dep't of Corrections, 16 F.3d 1001, 1005 (9th Cir. 1994), rev'd on
 4 other grounds, 514 U.S. 499 (1995). In sum, if the parole board's determination
 5 of parole unsuitability is to satisfy due process, there must be some evidence,
 6 with some indicia of reliability, to support the decision. Rosas v. Nielsen, 428
 7 F.3d 1229, 1232 (9th Cir. 2005).

8 The record shows that the BPT panel afforded petitioner and his counsel
 9 an opportunity to speak and present their case at the hearing, gave them time to
 10 review petitioner's central file, allowed them to present relevant documents and
 11 provided them with a reasoned decision in denying parole.

12 The panel concluded that petitioner "is not yet suitable for parole and
 13 would pose an unreasonable risk of danger to society or a threat to public safety
 14 if released from prison." Feb. 5, 2005 Hr'g Tr. at 34 (Resp't Ex. 2). The panel
 15 explained that it found that the offense was carried out "in an extremely callous
 16 manner" and that it demonstrated a "total disregard for . . . human suffering." Id.
 17 at 34-35. Petitioner and fellow gang members agreed to drive by and fire at a
 18 rival gang member's house. As their truck went past the house, petitioner fired
 19 four shots out of the window of the truck and hit and killed an eight year old boy
 20 who was playing outside. The panel found that the "motive for the crime was
 21 extremely trivial because this was just gang rivalry and yet an innocent child lost
 22 [his] life." Id. at 35.

23 The panel also found that petitioner had a "record of unstable [social
 24 history and] relationships due to his gang affiliation," and that he had "failed to
 25 profit from society's previous attempts to correct his criminality," which included
 26 juvenile home probation. Id. Petitioner was arrested for assault with a deadly
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1 weapon after a sixteen year old was shot and hospitalized, and had juvenile
 2 petitions sustained for grand theft auto and theft.

3 The panel noted that petitioner had "programmed in self-help in a limited
 4 manner while incarcerated." Id. at 36. He had not obtained his GED despite
 5 being advised to do so at his previous hearing and had not participated in any sort
 6 of self-help programs in more than five years.

7 The panel noted that petitioner's psychiatric/psychological report was "not
 8 totally supportive of release." Id. at 37. The January 2004 report stated that
 9 petitioner posed a low to moderate likelihood of becoming involved in violence if
 10 released to the community. Petitioner also "lack[ed] realistic parole plans." Id. at
 11 38. He did not have any letter clarifying where he would live while on parole, or
 12 any job offers or solid prospects.

13 The panel stated that it believed petitioner was "extremely remorseful,"
 14 but that he had done very little to help himself "with regard to doing what the
 15 Panel has asked you to do." Id. at 38-39. "In fact, in the '95, '96, '97, '98, 200,
 16 and 2002[hearings], you either waived your appearance or you stipulated to
 17 unsuitability." Id. at 39. The panel commended petitioner for
 18 staying disciplinary-free for several years and for recent gains (including
 19 participation in the culinary literary program and obtaining a vocational
 20 certificate in small engine repair), but concluded that "these positive aspects of
 21 your behavior . . . do not outweigh the factors of unsuitability." Id. at 40.

22 The California superior, appellate and supreme courts rejected petitioner's
 23 claims and upheld the decision of the BPT. The state courts' rejection of
 24 petitioner's federal due process claim was not contrary to, or involved an
 25 unreasonable application of, the Hill standard, or was based on an unreasonable
 26 determination of the facts. See 28 U.S.C. § 2254(d). The BPT's February 5,

1 2005 decision to deny petitioner parole is supported by some evidence in the
 2 record and that evidence bears some indicia of reliability. See, e.g., Rosas, 428
 3 F.3d at 1232-33 (upholding denial of parole based on gravity of offense and
 4 psychiatric reports); Biggs, 334 F.3d at 916 (upholding denial of parole based
 5 solely on gravity of offense and conduct prior to imprisonment); Morales, 16
 6 F.3d at 1005 (upholding denial of parole based on criminal history, cruel nature
 7 of offense, and need for further psychiatric treatment). The inquiry under Hill is
 8 simply "whether there is any evidence in the record that could support the
 9 conclusion reached by the [BPT]." Hill, 474 U.S. at 455-56 (emphasis added).
 10 There is – petitioner has a pre-commitment record of escalating criminal conduct,
 11 unstable social history and relationships with others characterized by gang
 12 activity; petitioner has not upgraded educationally and obtained his GED, as
 13 requested, or participated in self-help programs in over five years; petitioner's
 14 January 2004 psychiatric/psychological report is not totally supportive of release,
 15 noting a low to moderate likelihood of becoming involved in violence if released
 16 to the community; and petitioner's parole plans are not firm enough, as evidenced
 17 by a lack of a job offer or solid prospect. Cf. Cal. Code Regs. tit. 15, § 2402(c) &
 18 (d) (listing circumstances tending to show unsuitability for parole and
 19 circumstances tending to show suitability). It is not up to this court to "reweigh
 20 the evidence." Powell v. Gomez, 33 F.3d 39, 42 (9th Cir. 1994).

21 Petitioner argues that the BPT's continued reliance on the immutable
 22 circumstances of his murder offense and pre-commitment conduct conflicts with
 23 the Ninth Circuit's ruling in Biggs.¹ The argument is without merit because the

25 26 27 28 ¹In Biggs, the Ninth Circuit upheld the initial denial of a parole release date based solely on the nature of the crime and the prisoner's conduct before incarceration, but cautioned that, over time, denying a prisoner parole strictly because of the nature of his offense and his prior conduct "would raise serious

BPT panel's denial of parole was not based solely on petitioner's commitment offense and conduct prior to incarceration. Ample other evidence in the record (e.g., insufficient educational and self-help programming; a less-than-favorable psychiatric evaluation and lack of firm parole plans) constitutes some evidence under Hill. See Hill, 474 U.S. at 455-56 (inquiry under Hill is simply whether there is any evidence in the record that could support the conclusion reached by the BPT).

Petitioner also claims that the BPT violated the terms of his plea agreement by allowing the commitment offense to be a basis for parole denial. The claim is without merit.

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262 (1971). A plea agreement containing a specific promise, such as when the defendant will be paroled, is enforceable. See Brown v. Poole, 337 F.3d 1155, 1161 (9th Cir. 2003) (that state prosecutor had no right to offer deal defendant accepted in exchange for waiving her constitutional rights may be a problem for state, but not defendant). But it is petitioner who bears the burden of proving any alleged promise made by the prosecution. See Santobello, 404 U.S. at 261-62. Petitioner makes no such showing. Nor is there any indication in the record that petitioner was promised that his crime would not be considered at his parole consideration hearings. The state courts' rejection of petitioner's breach of plea agreement claim cannot be said to be objectively unreasonable. See 28 U.S.C. § 2254(d); Williams, 529 U.S. at 409.

questions involving his liberty interest in parole . . . and could result in a due process violation." Biggs, 334 F.3d at 916-17.

CONCLUSION

For the reasons set forth above, the petition for a writ of habeas corpus is DENIED.

The clerk shall enter judgment in favor of respondent and close the file.

SO ORDERED.

DATED: October 31, 2007


CHARLES R. BREYER
United States District Judge